90-1514

No. _____

Supreme Court, U.S.
FILED
APR 1 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

ANITA LOCKWOOD, Secretary of Department of Energy, Minerals and Natural Resources; and WALTER SMITH, former Director of the Energy Conservation and Management Division of the Department of Energy, Minerals and Natural Resources; in their individual capacities,

Petitioners,

vs.

JAMES KOZAK,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of New Mexico

PETITION FOR WRIT OF CERTIORARI

JOHN L. LENSSEN,
Counsel of Record
for Petitioners, and
MAHA KHOURY
LENSSEN AND MANDEL
Post Office Box 1904
Santa Fe, NM 87504-1904
(505) 983-6373

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Whether, in an action brought in state court pursuant to 42 U.S.C. § 1983, a state appellate court can refuse to hear defendants' appeal from an order denying their claim to qualified immunity.

II. Whether Petitioners Anita Lockwood and Walter Smith in their individual capacities are entitled to qualified immunity.

PARTIES

In the New Mexico District Court, plaintiff styled his lawsuit as "Petitioner" vs. "Respondents". To avoid confusion Petitioners herein will refer to themselves as Petitioners or Defendants and will refer to James Kozak as Respondent or Plaintiff.

Plaintiff below sued the New Mexico Department of Energy, Minerals & Natural Resources ("Department"), Anita Lockwood and Walter Smith in both their official and individual capacities. The suits against the Department and Lockwood and Smith in their official capacities were dismissed as to the 42 U.S.C. § 1983 claims but remain in the district court as to the state claims.

The issues presented here and to the New Mexico Supreme Court concern only the individual capacity claims against Petitioners Lockwood and Smith pursuant to 42 U.S.C. § 1983.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

OPINIONS AND RULINGS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED 1

STATEMENT OF THE CASE 3

ARGUMENT 7

I. A state court cannot refuse to hear an immediate appeal from an order denying qualified immunity 8

A. The New Mexico Supreme Court's order conflicts with decisions of this Court 8

B. The New Mexico Supreme Court's order conflicts with the highest courts of other states .. 11

C. Insofar as the decision below may have been based on pending official capacity claims, it conflicts with the majority decisions of the United States Courts of Appeal 13

II. Petitioners are entitled to qualified immunity .. 15

A. Respondent has failed to allege a violation of clearly established law 15

B. The established law supports Petitioners' claim to immunity 19

CONCLUSION 22

Appendix A ..... App. 1

Appendix B ..... App. 2

TABLE OF CONTENTS – Continued

Page

Appendix C ..... App. 5

Appendix D ..... App. 6

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT CASES CITED:

Anderson v. Creighton, 483 U.S. 635 (1987) 17

Board of Regents v. Roth, 408 U.S. 564 (1972).. 17, 18, 20

Brown v. Western Railway of Alabama, 338 U.S. 294 (1949) 8

Butz v. Economou, 438 U.S. 478 (1978) 9

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 6

Davis v. Sherer, 468 U.S. 183 (1984)..... 13

Felder v. Casey, 108 S.Ct. 2302 (1988) 8, 9, 10

Free v. Bland, 369 U.S. 663 (1962)..... 8

Garrett v. Moore-McCormack, 317 U.S. 239 (1942) 8

Harlow v. Fitzgerald, 457 U.S. 800 (1982)... 9, 10, 14, 15

Kentucky v. Graham, 473 U.S. 159 (1985) 14

Malley v. Briggs, 475 U.S. 335 (1986)..... 17

Martinez v. California, 444 U.S. 277 (1980)..... 9

Mitchell v. Forsyth, 472 U.S. 511 (1985) ..... *passim*

Nixon v. Fitzgerald, 457 U.S. 731 (1982)..... 15

Perry v. Sindermann, 408 U.S. 593 (1972)..... 17, 18, 19

Wilson v. Garcia, 471 U.S. 261 (1985)..... 9, 10

Wood v. Strickland, 420 U.S. 308 (1975) 9

TABLE OF AUTHORITIES – Continued

Page

OTHER FEDERAL CASES CITED:

Bever v. Gilbertson, 724 F.2d 1083 (4th Cir. 1984) 13

Brown v. Texas A&M University, 804 F.2d 327 (5th Cir. 1986) 13

De Abadia v. Izquierdo Mora, 792 F.2d 1187 (1st Cir. 1986) 13

De Vargas v. Mason & Hanger-Silas Mason Co., Inc., 844 F.2d 714 (10th Cir. 1988) 13, 14

Drake v. Scott, 812 F.2d 395 (8th Cir.), *cert. denied*, 108 S.Ct. 455 (1987) 13

England v. Rockefeller, 739 F.2d 140 (4th Cir. 1984) 13

Giacalone v. Abrams, 850 F.2d 79 (2nd Cir. 1988) 13

Jones v. City and County of Denver, Colo., 854 F.2d 1206 (10th Cir. 1988) 13

Justice v. Town of Blackwell, 820 F.2d 238 (7th Cir. 1987) 14

Kaiter v. Town of Boxford, 836 F.2d 704 (1st Cir. 1988) 14

Kennedy v. City of Cleveland, 797 F.2d 297 (6th Cir. 1986), *cert. denied*, 107 S.Ct. 1334 (1987) 13

Marx v. Gumbinner, 855 F.2d 783 (11th Cir. 1988) 13

Musso v. Hourigan, 836 F.2d 736 (2nd Cir. 1988) 13

Prisco v. United States Dept. of Justice, 851 F.2d 93 (3rd Cir. 1988), *cert. denied*, 109 S.Ct. 2428 (1989) 14

Pueblo Neighborhood Health Centers, Inc. v. Losavio, 847 F.2d 642 (10th Cir. 1988) 17

Scott v. Lacy, 811 F.2d 1153 (7th Cir. 1987) 13, 14

TABLE OF AUTHORITIES – Continued

Page

Tubbesing v. Arnold, 742 F.2d 401 (8th Cir. 1984) 13

Young v. Lynch, 846 F.2d 960 (4th Cir. 1988) 13, 14

STATE CASES CITED:

Anderson v. City of Hopkins, 393 N.W.2d 363 (Minn. 1986) 11, 12

Breault v. Chairman of the Board of Fire Com'rs., 401 Mass. 26, 513 N.E.2d 1277 (1987), *cert. denied*, 108 S.Ct. 1078 (1988) 11

Henke v. Superior Court, 161 Ariz. 96, 775 P.2d 1160 (Ariz. App. 1989) 11

Noyola v. Flores, 740 S.W.2d 493 (Tex. App. 1987) 11

Ohio Civil Service Employees Association v. Moritz, 39 Ohio App. 2d 132, 529 N.E.2d 1290 (1987) 11

Pizzato's Inc. v. City of Berwyn, 168 Ill. App.3d 796, 119 Ill. Dec. 583, 523 N.E.2d 51 (1988), *cert. denied*, 109 S.Ct. 1315 (1989) 11

Richardson v. Chevrefils, 552 A.2d 89 (N.H. 1988)..... 11

Robinson v. Beaumont, 291 Ark. 477, 725 S.W.2d 839 (1987) 11

State v. Hogg, 311 Md. 446, 535 A.2d 923 (1988) 11

NEW MEXICO CASES CITED:

Chavez v. New Mexico Health & Environment Dept., et al., New Mexico Supreme Ct. No. 18,960 (filed March 8, 1991) 16

Jacobs v. Stratton, 94 N.M. 665, 615 P.2d 982 (1980) 19

TABLE OF AUTHORITIES – Continued

Page

Kestenbaum v. Pennzoil Co., 108 N.M. 20, 766 P.2d 280 (1988) 21

Lovato v. City of Albuquerque, 106 N.M. 287, 742 P.2d 499 (1987) 17, 18

Melnick v. State Farm Mutual Automobile Ins. Co., 106 N.M. 726, 749 P.2d 1105 (1988) 19

Sanchez v. The New Mexican, 106 N.M. 76, 738 P.2d 1321 (1987) 19

Vigil v. Arzola, 102 N.M. 682, 699 P.2d 613 (Ct. App. 1983) 21

CONSTITUTIONAL PROVISIONS, RULES & STATUTES CITED:

Supremacy Clause, U.S. Const., Art. VI, Sec. 2 .. 1, 6, 8

U.S. Const., Amendment V 1, 4

U.S. Const., Amendment XIV, Sec. 1 ..... 2, 5

28 U.S.C. § 1257(3) 1

42 U.S.C. § 1983 ..... 2, 4, 5, 6, 9

42 U.S.C. § 1988 10

NMSA 1978, § 10-9-13 ..... 2, 20

NMSA 1978, § 10-9-18 21

SCRA 1986, 12-102(A)(1) 3

State Personnel Board Rule 14.8 3

State Personnel Board Rule 14.8(C) 2, 3, 4, 15, 21

State Personnel Board Rule 14.8(D) 21

OPINIONS AND RULINGS BELOW

The New Mexico district court denied petitioners' claim to qualified immunity. This order is attached as Exhibit B. The district court certified its ruling on the motion to dismiss to the New Mexico Supreme Court for an interlocutory appeal which was denied. Appendix C. Petitioners filed an appeal as of right on the qualified immunity issue and the appeal was dismissed. Appendix A.

JURISDICTION

The New Mexico Supreme Court entered an order dismissing defendants' appeal on January 30, 1991. Appendix A. Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. U.S. Constitution, Article VI, Section 2, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. U.S. Constitution, Amendment V provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

3. U.S. Constitution, Amendment XIV, Section 1 provides in pertinent part:

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . .

4. 42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

5. New Mexico's Personnel Act, NMSA 1978, §§ 10-9-1 to -25 (Repl. Pamp. 1990) provides in pertinent part:

> § 10-9-13. Rules; adoption; coverage.
>
> Rules promulgated by the board . . . shall provide, among other things, for:
>
> . . . .
>
> E. a period of probation of one year during which a probationer may be discharged or demoted or returned to the eligible list without benefit of hearing.

6. State Personnel Board Rule 14.8(C) provides in full:

> Probationers may be dismissed, demoted or suspended for any reason the employer deems appropriate with no less than 24 hours and no more than seven days written notice.
>
> 1. Incumbents must be advised in writing of the reasons for the dismissal, demotion, or suspension, and the effective date.

2. Incumbents must be advised of their right to file a complaint with the agency.

7. State Personnel Board Rule 14.8 in its entirety. *See* Appendix D.

8. The New Mexico Rules of Appellate Procedure; Judicial Volume 2 of the New Mexico statutes; SCRA 1986, 12-102(A)(1) provides:

> 12-102 Appeals; where taken.
>
> A. Supreme court. The following appeals shall be taken to the supreme court:
>
> (1) appeals from the district courts in which one or more counts of the complaint alleges a breach of contract or otherwise sounds in contract;
>
> . . . .

STATEMENT OF THE CASE

James Kozak began working as program manager of the Weatherization Assistance Program with the New Mexico Department of Energy, Minerals and Natural Resources on January 30, 1989. Before completing his one year's service as a probationary employee, he was dismissed from employment. On December 27, 1989, a letter from his supervisor, Petitioner Walter Smith, notified Mr. Kozak that his probationary appointment was terminated effective January 4, 1990. It stated that the reason for the dismissal was failure to institute adequate fiscal controls and monitoring procedures for subgrantees in the Weatherization Assistance Program. The letter advised Mr. Kozak that he had the right to file a complaint with the Department pursuant to State Personnel Board Rule (hereinafter SPBR) 14.8(C). On the same day, plaintiff

submitted a complaint in the form of a memorandum to Walter Smith and on December 29, 1989, plaintiff's attorney submitted a complaint in the form of a letter to the Deputy Secretary of the Department. Both complaints requested a pre-termination hearing which was provided on January 2, 1990. In both the complaints and at the hearing, plaintiff recited the tasks he had accomplished, emphasized the favorable evaluations received on his work and requested further and more specific reasons for his dismissal. The Deputy Secretary and the Department attorney listened to Mr. Kozak and his attorney's presentations, and at Mr. Kozak's request, telephoned a U.S. Department of Energy consultant, Tom Stroud, who spoke on Mr. Kozak's behalf. After the hearing the Deputy Secretary and Department attorney briefly discussed the hearing with the Department Secretary, Petitioner Anita Lockwood, who saw no reason to change the initial decision to terminate plaintiff. Mr. Kozak was given no further reasons for his dismissal. On the same day, a letter informed Mr. Kozak that, after considering the complaints and the comments at the hearing, the initial determination would stand.

A few days after his discharge, Mr. Kozak initiated suit in New Mexico district court alleging breach of contract, bad faith and violations of his procedural and substantive due process rights pursuant to 42 U.S.C. § 1983. He claimed a violation of a property interest.

In his "Petition For Damages and Declaratory and Injunctive Relief" (hereinafter "complaint"), plaintiff cites to SPBR 14.8(C), 42 U.S.C. Section 1983, and the Fifth and

Fourteenth Amendments to the United States Constitution. Aside from these, plaintiff does not allege any other law, policy or decision that defendants allegedly violated.

Defendants filed a Rule 12(B)(6) motion to dismiss. The motion included a claim for qualified immunity. Among other things, defendants argued that plaintiff did not allege any clearly established law the violation of which would sustain the denial of qualified immunity, and that plaintiff was given exactly the procedures required for the dismissal of a probationary employee. Defendants cited to this Court's cases on qualified immunity and argued there was no violation, nor any allegations of a violation, of a clearly established right of which a reasonable person would have known at the time of the conduct at issue. Memorandum of Points and Authorities in Support of Dismissal, pp. 4-5.

The district court, over defendants' objections that discovery was unnecessary and improper, permitted plaintiff to take the depositions of defendants Lockwood and Smith and of Gloria Lithgow, director of the Administrative Services Division at the Department. A hearing was held on the motion to dismiss and, except for plaintiff's concessions that the Department and defendants Lockwood and Smith in their official capacities be dismissed as to the Section 1983 claims, defendants' motion was denied, including their claim to qualified immunity. The district court certified its ruling for an interlocutory appeal and all of the defendants below filed an application to the New Mexico Supreme Court. The discretionary appeal was denied. Appendix C.

Petitioners Lockwood and Smith, in their individual capacities, filed an appeal as of right contesting the denial of their claim to immunity one day before the filing of the application for interlocutory appeal. Respondent filed a motion to dismiss the appeal alleging that the order denying qualified immunity was not a final appealable order; that petitioners may nonetheless remain in the suit in their official capacities; and that the appeal was frivolously delaying the proceedings in the trial court. Motion to Dismiss Appeal.

Petitioners argued to the New Mexico Supreme Court that immunities under 42 U.S.C. § 1983 were a matter of substantive federal law; that state courts were required to hear the appeal of a denial of a claim for qualified immunity under the Supremacy Clause, U.S. Const. Art. VI, Sec. 2, and the doctrine of preemption; that not allowing the appeal would diminish defendants' rights to a mere defense to liability; and that such a ruling would conflict with federal law. Defendants' Response to Motion to Dismiss Appeal, pp. 2-5, and Oral Argument. Petitioners further argued that New Mexico should, but need not, adopt the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); that an order denying qualified immunity is a final, appealable order in accord with New Mexico's doctrine of finality. Defendants' Response to Motion to Dismiss Appeal, pp. 5-7. As to the pending official capacity claim, Petitioners cited the majority of federal circuit court decisions allowing an immediate appeal despite a pending official capacity claim, and argued that the purposes and policies of qualified immunity were still present in such cases. *Id.* at pp. 7-8. The New Mexico Supreme Court scheduled the

motion for oral argument which was held on January 30, 1991, and thereupon granted plaintiff's motion to dismiss giving no reasons for its ruling. Appendix A.

The district court retains jurisdiction over the state claims, i.e., breach of contract and bad faith. These claims involve only the Department and the official capacity claims. The New Mexico Supreme Court has stayed its mandate dismissing the personal capacity appeal until April 1, 1991.

ARGUMENT

It would be difficult to present a clearer case of entitlement to qualified immunity than the present one. The courts of New Mexico, however, have displayed an ignorance, or perhaps a conscious disregard, of this doctrine. Respondent has not and cannot allege a clearly established law violated by Petitioners because no such law exists. Indeed, the Due Process Clause and its application to the property interest of a New Mexico state probationary employee clearly establish the frivolous nature of his claims. The district court disregarded the test for qualified immunity and the state court of last resort refused to remedy this clearly erroneous ruling by taking the appeal, thus depriving Petitioners of their right to be free from the burdens of trial.

I. A state court cannot refuse to hear an immediate appeal from an order denying qualified immunity.

A. The New Mexico Supreme Court's order conflicts with decisions of this Court.

In dismissing defendants' appeal, the highest court in New Mexico has determined that Petitioners have no right to appeal a trial court order denying their claim to qualified immunity. This decision conflicts with this Court's determination that qualified immunity is "an *immunity from suit* rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) [emphasis in original]. In the name of procedure, the New Mexico Supreme Court has transformed and diminished the federal right into a mere defense to liability.

Whether the denial of a claim to qualified immunity is immediately appealable should not be a procedural question. It must be a matter of substantive law since an immediate appeal is a necessary adjunct, inseparable from the right to be free from suit. Without it, the right is effectively lost. *Id.*

The Supremacy Clause, U.S. Const., Art. VI, Sec. 2, imposes a constitutional duty on state courts to proceed in such a manner that all substantial rights under controlling federal law are protected. *Felder v. Casey*, 108 S.Ct. 2302 (1988); *Garrett v. Moore-McCormack*, 317 U.S. 239 (1942). States may establish rules of procedure governing litigation in their own courts, but a state forum entertaining a federal cause of action cannot defeat a federal right by forms of local practice. *Felder v. Casey*, citing *Brown v. Western Railway of Alabama*, 338 U.S. 294 (1949) and *Free v. Bland*, 369 U.S. 663 (1962).

This Court has held that the extent to which a 42 U.S.C. § 1983 defendant is protected by an immunity is a question of federal law. *Martinez v. California*, 444 U.S. 277 (1980); *Wood v. Strickland*, 420 U.S. 308 (1975). It makes no difference whether the defendant is a state, federal or local official, *Butz v. Economou*, 438 U.S. 478 (1978), or whether the federal cause of action is asserted in state court. State immunity laws do not control a claim for immunity as the immunities under Section 1983 are a matter of statutory construction. *Martinez v. California.*

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court redefined qualified immunity by abandoning the subjective component of the test. Among the reasons for the new definition was to allow resolution of the qualified immunity issue well before trial by making the entitlement a legal question in most cases. *Mitchell v. Forsyth* substantiated the holding in *Harlow* and defined the right as an immunity from suit, thereby giving defendants the right to immediately appeal the denial of a qualified immunity claim.

The decision to dismiss the appeal ignores the constitutional mandate under the Supremacy Clause and gives state procedural rules priority over substantive federal rights. It is also contrary to the important federal interest that federal laws be given uniform application within each state. *Felder v. Casey; Wilson v. Garcia*, 471 U.S. 261 (1985).

In *Felder*, this Court reversed a decision by the Supreme Court of Wisconsin which required a claimant to comply with notice provisions before any claim against a

governmental entity could be maintained. Although *Felder* acknowledged the authority of states to prescribe rules and procedures that govern actions in their own tribunals, it held these procedures inapplicable in Section 1983 litigation where they were inconsistent with, and therefore preempted by, the federal law. This Court stated that where state laws or procedures could alter the outcome of Section 1983 claims based solely on whether the claim is brought in state or federal court, such procedures must not apply in the federal cause of action. *Id.; see also Wilson v. Garcia* (for the sake of uniformity, the characterization of a Section 1983 claim for statute of limitations purposes is a question of federal law); *Cf.* 42 U.S.C. § 1988 (U.S. District Courts can apply state laws only if no suitable federal law exists and only if the state law is not inconsistent with the Constitution and laws of the United States). The rule in *Felder* should inure not only to the benefit of Plaintiffs, but should be applied evenhandedly to all parties.

The doctrine of qualified immunity, as defined by this Court, achieves a balance of the competing interests present in a federal civil rights action. *Harlow v. Fitzgerald*. The New Mexico Supreme Court's decision disrupts this balance. By not allowing an immediate appeal from the denial of a claim to qualified immunity, the New Mexico courts discriminate against the federal right. Defendants are now forced to remove the case to federal court, or to litigate a claim in state court which could have been resolved at an early stage. By giving no substance to qualified immunity, the filing of insubstantial claims will be encouraged. Most important, the considerations underlying the balance achieved by this Court

are not addressed if state and local officials perceive a greater risk of personal liability for making discretionary decisions necessary in the performance of their duties.

B. The New Mexico Supreme Court's order conflicts with the highest courts of other states.

Research reveals nine (9) other states who have addressed the issue. Six states would allow the immediate appeal. *Henke v. Superior Court*, 161 Ariz. 96, 775 P.2d 1160 (Ariz. App. 1989); *Robinson v. Beaumont*, 291 Ark. 477, 725 S.W.2d 839 (1987); *Breault v. Chairman of the Board of Fire Com'rs.*, 401 Mass. 26, 513 N.E.2d 1277 (1987), *cert. denied*, 108 S.Ct. 1078 (1988); *Anderson v. City of Hopkins*, 393 N.W.2d 363 (Minn. 1986); *Richardson v. Chevrefils*, 552 A.2d 89 (N.H. 1988); *see also State v. Hogg*, 311 Md. 446, 535 A.2d 923 (1988) (allowing immediate appeal from denial of immunity in a state tort action). All but one of these decisions were rendered by the highest state court.

Three intermediate appellate state courts have denied the appeal. Two courts viewed the issue as a procedural question and dismissed the appeal because it did not fall within the rules defining "finality" or any of its exceptions. *Ohio Civil Service Employees Association v. Moritz*, 39 Ohio App.2d 132, 529 N.E.2d 1290 (1987); *Noyola v. Flores*, 740 S.W.2d 493 (Tex. App. 1987). One intermediate court held that without a state supreme court rule providing jurisdiction for this kind of appeal, it would not assume jurisdiction. *Pizzato's Inc. v. City of Berwyn*, 168 Ill. App.3d 796, 119 Ill. Dec. 583, 523 N.E.2d 51 (1988), *cert. denied*, 109 S.Ct. 1315 (1989).

While state courts allowing the appeal agree with the reasoning in *Mitchell*, none address whether they are bound to follow *Mitchell*. *See, e.g., Anderson v. City of Hopkins*, 393 N.W.2d at 364 (*Mitchell* "is a well-reasoned case that *ought* to be followed . . . without regard to whether it *must* be followed") [emphasis in original].

Perhaps the lack of careful analysis on the impact of *Mitchell* indicates a reluctance by state courts to hold that a federal decision can have such an effect upon state procedures as to dictate when an order is "final" for purposes of appeal. Such a reluctance, however, is misplaced. Only immunities and the Double Jeopardy Clause of the Fifth Amendment present the unique right to be free from the burdens of trial. Mandating an immediate appeal as a matter of substantive federal law will not unduly encroach upon a state's traditionally acknowledged powers. Rather, it is the only way to assure the integrity of the right.

Mitchell did more than merely define the rules of federal procedure. It defined the nature of qualified immunity. A basic federal right to be immune from suit should not fluctuate based on the procedural mechanisms of various states. If an immediate appeal is not allowed, the right is diminished to a mere defense to liability. Since the issue of immediate appealability impacts on the federal right, it cannot be a procedural question. Immediate appealability is necessary to assure that qualified immunity is recognized in state courts.

C. Insofar as the decision below may have been based on pending official capacity claims, it conflicts with the majority decisions of the United States Courts of Appeal.

This Court has not yet addressed whether the denial of qualified immunity is immediately appealable when a claim for injunctive relief against the defendant in an official capacity is pending. *Mitchell v. Forsyth*, 472 U.S. at 519 n. 5; *but see Davis v. Sherer*, 468 U.S. 183, 187 n. 2 (1984).

The vast majority of federal circuit courts hold that the denial of a qualified immunity defense is immediately appealable even if the defendant will be tried in an official capacity regardless of the appeal. *See De Abadia v. Izquierdo Mora*, 792 F.2d 1187 (1st Cir. 1986); *Giacalone v. Abrams*, 850 F.2d 79 (2nd Cir. 1988); *Young v. Lynch*, 846 F.2d 960 (4th Cir. 1988) *overruling England v. Rockefeller*, 739 F.2d 140 (4th Cir. 1984) and *Bever v. Gilbertson*, 724 F.2d 1083 (4th Cir. 1984); *Kennedy v. City of Cleveland*, 797 F.2d 297 (6th Cir. 1986), *cert. denied*, 107 S.Ct. 1334 (1987); *Scott v. Lacy*, 811 F.2d 1153 (7th Cir. 1987); *Drake v. Scott*, 812 F.2d 395 (8th Cir.), *cert. denied*, 108 S.Ct. 455 (1987); *Tubbesing v. Arnold*, 742 F.2d 401 (8th Cir. 1984); *De Vargas v. Mason & Hanger-Silas Mason Co., Inc.*, 844 F.2d 714 (10th Cir. 1988); *Jones v. City and County of Denver, Colo.*, 854 F.2d 1206 (10th Cir. 1988) *Marx v. Gumbinner*, 855 F.2d 783 (11th Cir. 1988); *see also Musso v. Hourigan*, 836 F.2d 736 (2nd Cir. 1988) (appeal lies with respect to immunity issue even though defendant may have to undergo trial in a personal capacity on another constitutional claim); *Brown v. Texas A&M University*, 804 F.2d 327 (5th Cir.

1986) (denial of qualified immunity immediately appealable even though defendant faces another claim); *Justice v. Town of Blackwell*, 820 F.2d 238 (7th Cir. 1987) (denial of qualified immunity immediately appealable even though defendant has to defend a state law claim); *but see Kaiter v. Town of Boxford*, 836 F.2d 704 (1st Cir. 1988); *Prisco v. United States Dept. of Justice*, 851 F.2d 93 (3rd Cir. 1988), *cert. denied*, 109 S.Ct. 2428 (1989).

These decisions stress the significant differences between a personal claim for damages, and a claim for equitable relief against an official in an official capacity. *See Kentucky v. Graham*, 473 U.S. 159 (1985) (official capacity suits are, in all respects, suits against the governmental entity of which the officer is an agent). They reason that the purposes and policies of qualified immunity are still present and should not be defeated simply because there is a pending official-capacity claim. *See, e.g., De Vargas v. Mason & Hanger-Silas Mason Co., Inc.,; Young v. Lynch; Scott v. Lacy.*

The fear of being held personally liable for damages is a far cry from a suit for injunctive relief against the governmental entity and the public office. Some of the factors compelling an immediate appeal in personal capacity suits are the inhibition of discretionary action and deterrence of able people from public service. *See Mitchell v. Forsyth; Harlow v. Fitzgerald.* These considerations are not addressed if public officials operate under the fear of personal liability for discretionary decisions inherent and necessary in the performance of their duties, decisions which, when made, were objectively reasonable and not contrary to established law or constitutional rights.

Insofar as the New Mexico Supreme Court's dismissal rests on the fact that official capacity claims remain pending against Petitioners, it conflicts with the majority of the U.S. Circuit courts. It is also not in accord with the interests protected by qualified immunity and should be reversed.

II. Petitioners are entitled to qualified immunity.

Petitioners will now address the merits of their claim of immunity in the event this Court finds it proper to rule on the issue. *See Mitchell v. Forsyth*, 472 U.S. at 529 and *Nixon v. Fitzgerald*, 457 U.S. 731, 743, n. 23 (1982) (a purely legal question is appropriate for immediate resolution notwithstanding that it was not addressed by the lower appellate court).

A. Respondent has failed to allege a violation of clearly established law.

The question of Petitioners' immunity turns on whether it was clearly established in December of 1989 that a probationary state employee has the kind of protected property interest under the Fifth and Fourteenth Amendments that would require more procedural safeguards before dismissal than Respondent was given.

To this date, Respondent has failed to allege a violation of clearly established laws or constitutional rights of which a reasonable person would have known. *See Harlow v. Fitzgerald*. The complaint refers to the Due Process Clause of the Fifth and Fourteenth Amendments, and to State Personnel Board Rule 14.8(C), a rule which no New

Mexico opinions have yet addressed or interpreted.[1] Aside from these, the complaint alleges no other laws or rights which Petitioners allegedly violated. In his response to Petitioners' motion to dismiss, Respondent again failed to see the significance of alleging a clearly established law. The qualified immunity issue was addressed by Respondent as follows:

> [Defendants] have nevertheless argued that the individual [defendants] are entitled to a qualified immunity defense "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." [Defendants'] Memorandum, at 4. The short answer to this contention is that [Defendants] have not filed a motion for summary judgment or a motion to dismiss at the close of [Plaintiff's] evidence at trial, where the Court might have information allowing it to conclude that their allegations were correct. Rather, [Defendants] are seeking dismissal on the basis of qualified immunity without evidence, and strictly on the basis of the allegations in the complaint. Yet the allegations clearly allege that the [Defendants] breached their obligation to [Plaintiff] by failing to comply with the state personnel board rule regarding notice and a hearing, by alleging a reason for [Plaintiff's] dismissal which is arbitrary,

---

[1] An unpublished Decision by the New Mexico Supreme Court, filed on March 8, 1991, held that probationary state employees are "at-will" employees and that no cause is needed to justify dismissal. Further, the Court held there is no property interest which could afford any Due Process rights to a probationary employee. *Chavez v. New Mexico Health & Environment Dept., et al.*, Supreme Ct. No. 18,960.

> capricious, irrational, and contrary to all relevant facts, and by doing so willfully and in bad faith. It is difficult to understand how any clearer allegation of deliberate and willful misconduct, which no reasonable person would fail to recognize as violative of [Plaintiff's] statutory or constitutional rights, could be made.

In order for liability to attach in personal capacity claims, the contours of the right allegedly violated must be sufficiently clear so that a reasonable official would know that the alleged conduct violates that right. *Anderson v. Creighton*, 483 U.S. 635 (1987); *Malley v. Briggs*, 475 U.S. 335 (1986). Identifying an abstract right is insufficient to defeat a claim of immunity. *Anderson v. Creighton*. To this date, Respondent has failed to meet this burden. *See Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642 (10th Cir. 1988).

The only significant cases relied on by plaintiff below are *Board of Regents v. Roth*, 408 U.S. 564 (1972), *Perry v. Sindermann*, 408 U.S. 593 (1972) and *Lovato v. City of Albuquerque*, 106 N.M. 287, 742 P.2d 499 (1987). None are sufficient to defeat Petitioners' claim to immunity. In fact, *Roth* and *Sindermann* support Petitioners' actions. In *Roth*, this Court held that an assistant professor employed on probation for a fixed term of one academic year had no property right to a statement of reasons or a hearing on the decision not to rehire him for another year when no such right was granted by statute or rule. It held that the decision to terminate Roth's employment was left to the unfettered discretion of the University officials. In *Sindermann*, on the other hand, a protected property interest was found where the guidelines and policy of a state

college constituted a *de facto* tenure program for the faculty. It is interesting to note that the guidelines in *Sindermann* provided for a seven-year probationary period and the plaintiff argued entitlement to tenure because he was employed for ten years. The rule established by these two companion cases clearly undermines Respondent's claim that he has a reasonable expectation of continued employment. Like David Roth, Respondent was on probation. There were no other policies or guidelines which could have given him a legitimate claim of entitlement. *Board of Regents v. Roth*, 408 U.S. at 577.

Lovato v. City of Albuquerque addressed the property interest of a permanent city employee who had been a permanent city employee for 27 years, and who after 13 years on an "assignment" status, a nonpermanent advancement, was reassigned to a position corresponding to his status before the assignment. The New Mexico Supreme Court held that after a thirteen year employment in the assignment position, Lovato's status could not be considered temporary and thus he was entitled to the same full hearing given to permanent employees. *Lovato* did not address the status of probationary employees or whether they had a property interest in continued employment. Thus, it is difficult to see how *Lovato* could have apprised Petitioners that the dismissal of a probationary employee, after notice and an opportunity to respond both in writing and orally, violated any clearly established law.

As there are no laws or allegations of fact in the record sufficient to defeat Petitioners' claim to immunity, the inquiry should stop here and Petitioners should be granted immunity from suit. Nevertheless, Petitioners

will address the established law as it relates to their entitlement to qualified immunity.

B. The established law supports Petitioner's claim to immunity.

Respondent has failed to allege the violation of clearly established law because no such law exists. In fact, the body of law addressing the property interests of a probationary employee clearly authorizes the actions taken by Petitioners.

Petitioners argued to the district court in their motion to dismiss and to the New Mexico Supreme Court in their application for interlocutory appeal that established Federal and New Mexico law, insofar as the Due Process clause turns on a state created property interest, not only compels that defendants be given immunity from suit, but also supports the determination that a probationer is an at-will employee with no constitutionally protected property interest.

The established rule in public and private employment is that unless there is an intervening constitutional, statutory, common law or contractual provision stating otherwise, employment is for an indefinite period terminable at the will of either party. *See Perry v. Sindermann; Melnick v. State Farm Mutual Automobile Ins. Co.*, 106 N.M. 726, 749 P.2d 1105 (1988); *Sanchez v. The New Mexican*, 106 N.M. 76, 738 P.2d 1321 (1987); *Jacobs v. Stratton*, 94 N.M. 665, 667, 615 P.2d 982, 984 (1980) (a nontenured professor at a state university can be discharged for "no reason whatever, or for a variety of reasons"). In this case, there is no claim that the discharge was based on the exercise

of constitutional or statutory rights or a reason contrary to public policy, therefore, Respondent's rights are limited to the statutes and rules defining his employment. *See Board of Regents v. Roth.*

NMSA 1978, Section 10-9-13 (E) mandates the State Personnel Board to promulgate rules providing for "a period of probation of one year during which a probationer may be discharged or demoted or returned to the eligible list *without benefit of hearing.*" [Emphasis added.] In accordance with this mandate, State Personnel Board Rule 14.8(C) provides that "[p]robationers may be dismissed . . . for any reason the employer deems appropriate." They must be advised in writing of the reasons for the dismissal, of the effective date of dismissal, and of their right to file a complaint with the agency. *Id.* The December 27, 1989 letter of dismissal to James Kozak states:

> Pursuant to State Personnel Board Rule 14.8(c), your probationary appointment is hereby terminated effective January 4, 1990 at 5:00 p.m. The reason for this dismissal is not instituting adequate fiscal controls and monitoring procedures for subgrantees directly under your jurisdiction in the Weatherization Assistance Program.
>
> You are advised you have the right to file a complaint with the Department.

Petitioners did all that was required by the State Personnel Board Rules and the Personnel Act. Indeed, they went further and gave Respondent a hearing, with his attorney present, where he was allowed to call a witness on his behalf.

No decisions by the New Mexico courts could have given Respondent a reasonable expectation of continued employment as a probationary employee. On the contrary, a reading of New Mexico employment cases cited above suggests that a probationary employee is an at-will employee.

> It would make little sense to create a separate category of probationary employees if they were to be afforded the same procedural rights as nonprobationary employees.

Vigil v. Arzola, 102 N.M. 682, 686, 699 P.2d 613, 617 (Ct. App. 1983). Without an agreement, understanding, policy or other actions assuring continued employment, there is a presumption that the employment is terminable at will. *Kestenbaum v. Pennzoil Co.*, 108 N.M. 20, 766 P.2d 280 (1988).

Respondent does not have the entitlement enjoyed by permanent employees who cannot be discharged except for just cause and who have a right to an agency hearing, a full adversarial administrative hearing and an appeal. NMSA 1978, § 10-9-18; SPBR 14.8(D). Respondent's only argument is based on an original interpretation of Rule 14.8(C), an interpretation unsupported by law and insufficient to rebut the presumption that his employment was terminable at-will. Yet even if this strained argument prevails, it still cannot hold Petitioners individually liable.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the decisions below.

Respectfully Submitted,

JOHN L. LENSSEN,
Counsel of Record for Petitioners, and
MAHA KHOURY
LENSSEN AND MANDEL
Post Office Box 1904
Santa Fe, NM 87504-1904
(505) 983-6373

APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
Wednesday, January 30, 1991

NO. 19,583

JAMES KOZAK,

Petitioner-Appellee,

vs.

NEW MEXICO DEPARTMENT OF ENERGY, MINERALS AND NATURAL RESOURCES, et al.,

Respondents-Appellants.

This matter coming on for consideration by the Court upon Motion of Appellee to dismiss the appeal herein, and the Court having considered said petitin [sic] and being suffuciently [sic] advised;

NOW, THEREFORE, IT IS ORDERED that the Motion of Appellee to dismiss the appeal herein is hereby granted.

ATTEST: A TRUE COPY

/s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX B

FIRST JUDICIAL DISTRICT
COURT STATE OF NEW
MEXICO COUNTY OF SANTA
FE No. SF 90-87 (C)

ENDORSED
OCT 30 1990

JAMES KOZAK,

Petitioner,

vs.

THE NEW MEXICO DEPARTMENT OF ENERGY, MINERALS AND NATURAL RESOURCES; ANITA LOCKWOOD, Secretary of Department of Energy, Minerals and Natural Resources; and WALTER SMITH, Director of the Energy Conservation and Management Division of the Department of Energy, Minerals and Natural Resources; in both their official and individual capacities,

Respondents.

ORDER

THIS MATTER having come before this Court the 19th day of October, 1990, on Respondents' Motion to Dismiss, Paul L. Biderman appearing for Petitioner, and Respondents being represented by Maha Khoury of Lenssen and Mandel, the Court having read the briefs and having heard the arguments of counsel, and being fully advised in the premises, it is hereby

ORDERED that the Motion to Dismiss be, and hereby is, GRANTED insofar as the petition in the Third and

Fourth claims alleges a cause of action against Respondents the New Mexico Department of Energy, Minerals and Natural Resources, and against Respondents Lockwood and Smith in their official capacities, and DENIED in all other respects, including but not limited to the following:

Petitioner James Kozak, a probationary state employee, has a viable cause of action to contest the validity of the reason for his dismissal by alleging that it was arbitrary, capricious and irrational; petitioner accordingly has a constitutionally protected interest in continued employment; respondents Anita Lockwood and Walter Smith, in their individual capacities, are not entitled to the defense of qualified immunity;

THIS ORDER involves the above controlling questions of law as to which there is a substantial ground for difference of opinion and an immediate appeal from this Order may materially advance the ultimate determination of this litigation.

IT IS FURTHER ORDERED that the proceedings in District Court be STAYED until the determination of the Interlocutory Appeal.

/s/ Patricio M. Serna
DISTRICT JUDGE

Submitted:

LENSSEN and MANDEL
Attorneys for Respondents

By: /s/ Maha Khoury
Maha Khoury
Post Office Box 1904
Santa Fe, New Mexico 87504-1904
(505) 983-6373

Approved:

By: /s/ Paul L. Biderman
Paul L. Biderman
Attorney for Petitioner
Post Office Box 1447
Santa Fe, New Mexico 87504-1447
(505) 988-8979

APPENDIX C

IN THE SUPREME COURT OF THE
STATE OF MEXICO
Wednesday, November 28, 1990

NO. 19,537

JAMES KOZAK,

Plaintiff-Appellee,

vs.

THE NEW MEXICO DEPARTMENT OF ENERGY, MINERALS AND NATURAL RESOURCES, et al.,

Defendants-Appellants.

This matter coming on for consideration by the Court upon Application for Order Allowing an appeal, and the Court having considered said application and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that the application for order allowing an appeal is hereby denied.

ATTEST: A TRUE COPY

/s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX D

STATE PERSONNEL BOARD RULE 14.8

14.8 Dismissals, Demotions, and Suspensions.

A. All notices required by Rule 14.8 shall be served in accordance with the provisions of Rule 2.11.

B. Incumbents in temporary or emergency status may be dismissed, suspended or demoted for any reason the employer deems appropriate with at least 24 hours written notice.

C. Probationers may be dismissed, demoted or suspended for any reason the employer deems appropriate with no less than 24 hours and no more than seven days written notice.

1. Incumbents must be advised in writing of the reasons for the dismissal, demotion, or suspension, and the effective date.

2. Incumbents must be advised of their right to file a complaint with the agency.

D. Employees may be dismissed, demoted, or suspended only for just cause, which is any conduct, action, or inaction, arising from, or directly connected with the employee's work, which is inconsistent with the employee's obligations to the employer and reflects the employee's disregard of the employer's interests. Just cause includes, but is not limited to inefficiency, incompetency, misconduct, negligence, insubordination, performance which continues to be inadequate after reasonable efforts have been made to correct it, or conviction of a felony or misdemeanor and the provisions of the Criminal Offender Employment Act (Section 28-2-1, et seq., NMSA 1978) apply.

E. The dismissal, demotion, or suspension of an employee shall be accomplished according to the following procedures.

1. The employee will be served with a written notice of proposed disciplinary action which shall:

   a. cite the specific acts allegedly constituting just cause;

   b. provide an explanation of the evidence that the employer has;

   c. specify what the proposed disciplinary action is; and

   d. state that the employee is entitled to respond to the allegations in writing or request to be heard at an informal hearing within five days from service of the notice.

2. If the employee requests an informal agency hearing, the employer must conduct such hearing within five days of the employer's receipt of the request, unless the employee and the employer agree in writing to an extension of time. The employee has a right to be represented at this hearing, which is not a formal evidentiary proceeding, and to respond to the allegations and call material witnesses.

3. The employer shall consider the employee's response, if any, and determine what action is appropriate within five days of the response or hearing. If the employee does not respond to the notice of proposed disciplinary action in writing or request a hearing, the employer may proceed to determine the appropriate action and serve a notice of final decision. The employer may proceed with a notice of final decision before the end of the five day period for response if the employee's response is received or the hearing is concluded prior to the expiration of this period.

4. The written notice of final decision must:

   a. specify the date of service of the notice of proposed disciplinary action;

   b. address the employee's defenses, if any, to the notice of proposed disciplinary action;

   c. identify the specific acts constituting just cause, which may not include acts not specified in the notice of proposed disciplinary action;

   d. specify the disciplinary action, if any, to be taken;

   e. specify the effective date of the dismissal, demotion, or suspension which must be at least 24 hours after the date of service; and

   f. inform the employee that the disciplinary action may be appealed to the Board within thirty days of the effective date of the dismissal, demotion, or suspension.

F. The employer shall submit a personnel action request with a copy of any written notice required by Rule 14.8 to the Director for approval, which approval need not be made prior to the effective date of the disciplinary action. The final action shall be set aside if the Director finds it contains procedural errors.